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DISCOVERY OF EXPERT INFORMATION UNDER THE FEDERAL RULES

With the adoption of extensive pre-trial discovery mechanisms, preparation for trial in the federal system underwent a dramatic alteration. Instead of relying upon pleadings to perform the tasks of notice-giving, issue formulation, and fact-revelation, the various discovery devices available under the Federal Rules of Civil Procedure allow the parties "to obtain the fullest possible knowledge of the issues and facts before trial."¹ Discovery was created to promote the just, speedy, and inexpensive disposal of litigation. To this end, discovery serves to (1) facilitate the formulation and narrowing of issues; (2) protect against unfair surprise during trial; (3) detect any superfluous claims and defenses; and (4) encourage and aid attempts to reach a pre-trial settlement.² Pre-trial discovery was designed to eliminate the "sporting" theory of litigation and to provide instead for a resolution of litigation upon the merits.³

Concurrent with the growth of liberal discovery practices has been an increasing use of and reliance upon expert information in the investigation, preparation, disposition and trial of cases.⁴ Although prior to 1970 the

1. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). The Court further stated:

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. *Id.* at 507.

2. F. JAMES, *CIVIL PROCEDURE* § 6.2 (1965); Kalinowski, *Use of Discovery Against the Expert Witness*, 40 F.R.D. 43, 45 (1966) [hereinafter cited as Kalinowski]; Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111, 112-13 (1965) [hereinafter cited as Long]; Note, *Developments in the Law - Discovery*, 74 HARV. L. REV. 940, 944-46 (1961).

3. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2001 (1970) [hereinafter cited as 8 WRIGHT & MILLER].

4. Emroch, *Examination of the Adversary's Expert*, 1961 PERSONAL INJURY ANNUAL 727, 740-41. In discussing the importance of expert information in products liability litigation, Emroch quotes 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 12.02 [1] (1960 ed.):

[T]his is the age of the expert. Expert testimony has been and will continue to be tremendously important and, in some cases, indispensable, in products liability cases, in connection with such matters as proof or disproof of causation in fact, showing applicability or inapplicability of *res ipsa loquitur*, and proof or disproof of various other issues in respect to negligence. In fact, many trials of products liability cases boil down to a battle of the experts, with the jury being given the job of resolving the conflicting expert testimony.

Federal Rules of Civil Procedure contained no separate provisions concerning the discovery of the identity of experts or the opinions or facts held by them,⁵ the case law reflected a belief that information held or compiled by an expert should not be as freely discoverable as the information of other persons. Absent specific guidance from the Federal Rules, courts arrived at divergent solutions when confronted with the problem of how much, if any, discovery could be obtained from an expert retained by an opposing party.⁶

The limitations upon discovery of expert information created by the courts were grounded upon three concepts: (1) communications of experts are protected from disclosure by the attorney-client privilege; (2) the work product doctrine of *Hickman v. Taylor*⁷ applies to the information of experts retained by a party "in anticipation of litigation"; and (3) that it is unfair for the inquiring party to acquire information from an expert hired by the opposing party.⁸

Very few courts embraced the "privilege" theory. Moreover, the decision in *Hickman* that mere memoranda prepared by an attorney are not privileged created the inevitable conclusion that findings of an expert retained by a party should not fall within the purview of the attorney-client privilege.⁹ However, the work product doctrine established in *Hickman* was deemed by many courts to impede the discovery of expert information.¹⁰

Treating as work product the findings of an expert retained by a party was severely criticized. Courts felt that the observations and findings of the

5. The only provision concerning experts was rule 35 requiring a liberal exchange of information held by medical experts when the mental or physical condition of a party was in controversy.

6. See generally *Maginnis v. Westinghouse Elec. Corp.*, 207 F. Supp. 739 (E.D. La. 1962), and cases cited therein; Annot., 86 A.L.R.2d 138 (1962).

For an often-cited example of the judicial divergence on the issue of expert discovery, see *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947) and *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948), *aff'g per curiam*, *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947). The Massachusetts and Ohio courts had before them the issue of the discoverability of experts retained in anticipation of litigation by the plaintiff. The Ohio court held discovery was permissible; the Massachusetts court ruled discovery of such experts was improper.

7. 329 U.S. 495 (1947).

8. Friedenthal, *Discovery and Use of An Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962) [hereinafter cited as Friedenthal]; Note, *Discovery of Experts: A Historical Problem and A Proposed FRCP Solution*, 53 MINN. L. REV. 785 (1969) [hereinafter cited as 53 MINN. L. REV.].

9. Friedenthal, *supra* note 8, at 455-69; 53 MINN. L. REV., *supra* note 8, at 794. See also *Maginnis v. Westinghouse Elec. Corp.*, 207 F. Supp. 739, 743 (E.D. La. 1962).

10. Friedenthal, *supra* note 8, at 472.

expert are distinct and dissimilar from the legal analysis and mental impressions of an attorney which the work product doctrine seeks to shelter from disclosure:

[T]here seems little justification for extending work product to cover expert information. The opinions and conclusions of an expert are not those which *Hickman* sought to protect. Unlike the attorney's impressions or those of the client or his investigators as to the value of certain evidence or the veracity of a potential witness, the opinions and conclusions of an expert constitute evidence in themselves, and may be the only way in which to establish facts material to the case. Indeed, the report of an expert to the attorney is sought for the very purpose of obtaining such facts and it can hardly be said that once in the hands of the attorney the information becomes "protected conclusions" any more than does an eyewitness account by any other witness. The demoralizing aspects of discovery foreseen in the *Hickman* case are certainly not present when a deposition is taken, since the only danger is that the expert might trip himself should he change his testimony at the trial. It is apparent that in this respect the expert is no different from any other witness who has information relevant to the case.¹¹

The "unfairness" discovery limitation was predicated upon the belief that one who engages the services of an expert is purchasing the property of that expert, and to permit liberal discovery of his information would foster laziness and allow a party to prepare his case at the expense of his opponent.¹² This objection represents the crux of the resistance to open discovery of the expert. In a legal environment that regards the procurement and development of expert assistance as a trait of the successful trial lawyer, it seems inconsistent to allow the opponent easy access to the expert and his information.

According to the Federal Rules, the scope of discovery extends to any unprivileged matter relevant to a pending action.¹³ The purposes for allowing such a broad scope of discovery¹⁴ are as applicable to the facts and opinions of experts as they are to lay witnesses and other permitted objects of discovery.¹⁵

11. *Id.* at 472-73. *Accord*, *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968); *United States v. McKay*, 372 F.2d 174 (5th Cir. 1967). *See also* *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55 (N.D. Ohio 1953).

12. Friedenthal, *supra* note 8, at 479-88.

13. FED. R. CIV. P. 26(b)(1).

14. *See* note 2 and accompanying text *supra*.

15. If the principal value to be served by liberal discovery practice is the promotion of justice by the elimination of surprise, then such a practice would seem to be especially necessary in the case of expert witnesses. Discovery makes it possible to explore effectively on cross-examination the basis of an expert's opinion, thus providing a

This conflict between the liberal discovery policy of the Federal Rules and judicially-imposed restrictions on the discovery of experts was finally resolved by the Amendments to the Federal Rules of Civil Procedure, which became effective July 1, 1970.¹⁶ Rule 26(b)(4)¹⁷ does not completely remove the restraints imposed on the discovery of the opinions and facts held by experts retained in anticipation of litigation but establishes a compromise solution.¹⁸ In drafting rule 26(b)(4), the restriction of discovery based upon privilege was repudiated, and classification of the expert's

necessary check on the witness. Given the high regard in which expert testimony is frequently held by lay triers of the fact, such a check would seem to be essential if the outcome of the case is to reflect the merits. Furthermore, the application of liberal discovery practice to experts would help in the formulation of issues in exactly the same way as it would with respect to lay witnesses. And, to the extent that an effect on settlement and length of trial is observed as a result of the discovery of lay witnesses, a similar effect should be observed in the case of experts. Kalinowski, *supra* note 2, at 46.

Cf. United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963); Leding v. United States Rubber Co., 23 F.R.D. 220 (D. Mont. 1959).

16. 398 U.S. 977 (1970).

17. FED. R. CIV. P. 26(b)(4) provides:

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

18. See 8 WRIGHT & MILLER, *supra* note 3, § 2029.

information on work product was deemed "ill-considered."¹⁹ However, the draftsmen did incorporate the "unfairness" doctrine into 26(b)(4).²⁰ The result is a rule creating a uniform approach to the problem by attempting to balance the need for access to the information of an opposing party's expert against the prejudicial effects of such inquiries.

THE APPLICATION OF RULE 26(b)(4) TO THE EXPERT

Discovery of facts known and opinions held by experts under rule 26(b)(4) is not the "free" discovery which was allowed by some courts prior to 1970.²¹ Although the rule does recognize that discovery is imperative in certain situations, it limits discovery to prevent a party from building his own case with the opinions of experts retained by others.²² To determine whether and how much discovery will be allowed of a particular expert, one must first ascertain whether rule 26(b)(4) applies to that expert.

Professors Wright and Miller have established four classes into which an expert may fall:

- (1) Experts retained or specially employed in anticipation of litigation who a party expects to use as a witness at trial.
- (2) Experts retained or specially employed in anticipation of litigation or preparation for trial but not expected to testify at trial.
- (3) Experts informally consulted in preparation for trial but not retained.
- (4) Experts whose information was not acquired in preparation for trial.²³

Classes (1) and (2) embody the experts who were the subject of controversy prior to 1970—those retained by a party to assist in the preparation and trial. Rule 26(b)(4) expressly provides guidelines for discovery of the facts known and opinions held by experts "acquired or developed in anticipation of litigation or for trial."²⁴ "Anticipation of litigation" is not simply the consultation of an expert after suit has been filed. The problem of demarcation arises in determining whether a party was merely acting in the ordinary course of business when he instructed an expert to examine and report on a certain subject, or whether the instruction was given in contemplation of specific potential litigation. The issue becomes particularly

19. Advisory Committee's Note, *Proposed Amendments to the Federal Rules of Civil Procedure Relating To Discovery*, 48 F.R.D. 487, 504-05 (1970) [hereinafter cited as Advisory Committee's Note].

20. *Id.* at 505.

21. *United States v. John R.-Piquette Corp.*, 52 F.R.D. 370 (E.D. Mich. 1971), *discussing United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968).

22. *In re Brown Co.*, 54 F.R.D. 384 (E.D. La. 1972).

23. 8 WRIGHT & MILLER, *supra* note 3, § 2029, at 250.

24. FED. R. CIV. P. 26(b)(4).

acute when the party involved is an insurance company or similar entity whose business is of a nature that the possibility of litigation is present.

In *Thomas Organ Co. v. Jadranska Slobodna Plovidba*,²⁵ it was alleged that the defendant ocean carriers had damaged a shipment of the plaintiff's electronic organs. The plaintiff's insurer hired a marine surveyor who examined the goods shortly after the damage was sustained and submitted certain written reports to the insurer. Utilizing its right of subrogation, the insurer filed suit in the plaintiff's name more than fifteen months after the first report of the surveyor.²⁶ The plaintiff refused a request for the production of the surveyor's reports, contending that he was an expert whose reports were prepared in anticipation of litigation since a claim had arisen and litigation was a contingency at the time of the inspection of the surveyor.²⁷ Such a broad application of "anticipation of litigation" was rejected by the court on two grounds: at the time of preparation of the reports by the expert, the insurer had yet to consult counsel;²⁸ and the time lag between the observations and reports of the expert and the subsequent filing of suit.²⁹ The court was strongly influenced by the fact that, if the plaintiff's contentions were accepted, it would effectively immunize insurance companies and similar parties from discovery.³⁰

An expert's information is not protected by rule 26(b)(4) unless it was compiled in response to or in furtherance of a *specific* suit. Thus data prepared or obtained merely in the possibility of impending litigation is not within the scope of the rule.³¹ If the information of an expert retained

25. 54 F.R.D. 367 (N.D. Ill. 1972), discussed in *McDougall v. Dunn*, 468 F.2d 468 (4th Cir. 1972).

26. *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 371-72 (N.D. Ill. 1972).

27. *Id.* at 370.

28. *Id.* at 373. *Spaulding v. Denton*, 68 F.R.D. 342 (D. Del. 1975), rejected this rationale, noting that the 1970 amendments had expanded the scope of protection accorded work product under the rules to include non-lawyers. *Id.* at 344-45. However, *Spaulding* did concur with the definition of "anticipation of litigation" given in *Thomas Organ*.

29. *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 373-74 (N.D. Ill. 1972).

30. "If every time a party prepared a document in the ordinary course of business to guide claim handling, this document was deemed to be prepared in anticipation of litigation, it is difficult to see what would be discoverable." *Id.* at 374.

31. See *Spaulding v. Denton*, 68 F.R.D. 342 (D. Del. 1975); cf. *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029 (N.D. Ga. 1974). This decision interpreted "anticipation of litigation" only in regard to the work product rule of rule 26(b)(3). However, there is no reason to believe that "anticipation of litigation" should be defined differently under rule 26(b)(4). In *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972), the court did not draw any distinction between the meaning of "anticipation of litigation" when compelling the production of certain documents and when rejecting a claim of protection from discovery

by a party is compiled in the ordinary course of the party's business, it is freely discoverable even though the investigation was precipitated by the frequency of litigation involving such subject matter.³²

Expert information, which is neither acquired nor developed in anticipation of litigation, falls within the fourth class of experts—those who did not acquire their information in preparation for trial, but who were actors or viewers with respect to transactions or occurrences relevant to the lawsuit. Experts in this class are not protected by the provisions of 26(b)(4) but are discoverable as ordinary witnesses.³³ Included in this category are experts who are parties to the suit³⁴ or general employees of a party.³⁵

If an expert has been informally consulted by a party or his counsel and has not been retained, he is not subject to discovery.³⁶ But if the facts and opinions of an expert are developed subsequent to his being retained and in anticipation of litigation, discovery of the expert is governed by rule 26(b)(4). The quantum of discovery permissible under 26(b)(4) is dependent upon whether the party intends to use the expert as a witness at trial. Part (A) of the rule governs discovery of the expert expected to be called as a witness and part (B) controls discovery of the expert retained by the party but who is not expected to testify.

RULE 26(b)(4)(A): THE EXPERT EXPECTED TO BE CALLED AS A WITNESS

Prior to the 1970 amendments, a primary complaint concerning the refusal to allow discovery of experts was that it was exceedingly difficult to cross-examine effectively an opponent's expert witness without the advance preparation afforded by discovery.³⁷ Part (A) of 26(b)(4) provides

based on both 26(b)(3) and (b)(4). See also notes 70-85 and accompanying text *infra* (discussing the relationship of rule 26(b)(3) and the discovery of expert information).

32. Cf. *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029 (N.D. Ga. 1974). But see *Almaguer v. Chicago, R.I. & Pac. R.R.*, 55 F.R.D. 147 (D. Neb. 1972).

33. Advisory Committee's Note, *supra* note 19, at 503. See, e.g., *In re Brown Co.*, 54 F.R.D. 384 (E.D. La. 1972); *Duke Gardens Foundation, Inc. v. Universal Restoration, Inc.*, 52 F.R.D. 365 (S.D.N.Y. 1971).

34. *Rodrigues v. Hrinda*, 56 F.R.D. 11 (W.D. Pa. 1972); *Connecticut Mut. Life Ins. Co. v. Shields*, 17 F.R.D. 277 (S.D.N.Y. 1955).

35. *Russo v. Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947). If the relevant information of the general employee-expert was obtained only when he was specially assigned to the subject matter of the suit in anticipation of litigation, the information is protected by the discovery limitations of 26(b)(4). See *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202 (N.D. Miss. 1972). For further discussion, see note 66 and accompanying text *infra*.

36. *Nemetz v. Aye*, 63 F.R.D. 66 (W.D. Pa. 1974); Advisory Committee's Note, *supra* note 19, at 504.

37. Advisory Committee's Note, *supra* note 19, at 503. "A California study of discovery

relief by requiring a party to answer interrogatories concerning the facts and opinions on which the expert will testify and empowering the court to grant additional discovery if necessary.

When interrogatories are served upon a party pursuant to 26(b)(4)(A), a good faith judgment as to whether a retained expert will in fact be called to testify is required. Any doubts should be resolved in favor of disclosure.³⁸ Discovery under 26(b)(4) should be limited until after the parties have determined who will be their expert witnesses.³⁹ At what time a party should know whether he expects to call the expert is left unanswered by the rule and is determined by the court.⁴⁰ The courts are vested with sufficient discretionary authority to prevent abusive or prejudicial actions during pre-trial discovery and to insure that discovery responses are timely and adequate. After a party has answered 26(b)(4) interrogatories concerning the identity and opinions of the experts he expects to call, the party has a continuing duty to supplement seasonably his response with information on any additional expert testimony he decides to use at trial.⁴¹

As two recent decisions illustrate, a failure to respond adequately to interrogatories and supplement the responses can result in the court imposing sanctions on the recalcitrant party. In a products liability action, *Weiss v. Chrysler Motors Corp.*,⁴² Chrysler had not revealed to the plaintiff any opinions of its expert concerning the possibility that the failure of an auto part was due to damage occurring during the accident and not caused by a manufacturing defect. The Second Circuit held that, by permitting

and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is 'lengthy—and often fruitless—cross-examination during trial,' and recommends pretrial exchange of such material." *Id.*, citing CALIF. LAW REV. COMM'N, DISCOVERY IN EMINENT DOMAIN PROCEEDINGS 707-10 (Jan. 1963).

38. Blair, *A Guide to the New Federal Discovery Practice*, 21 DRAKE L. REV. 58, 64 (1971).

39. Advisory Committee's Note, *supra* note 19, at 504. This limitation is intended to prevent a party from using his opponent's experts to prepare his own case. *Kozar v. Chesapeake and O. Ry.*, 320 F. Supp. 335 (W.D. Mich. 1970), *aff'd in part, vacated and remanded in part on other grounds*, 449 F.2d 1238 (6th Cir. 1971) (discovery denied after the inquiring party admitted it did not intend to hire a mechanical engineer until after receiving the conclusions of the opponent's mechanical engineering experts).

40. One commentator, criticizing the lack of guidelines on the timing aspect of discovery under rule 26(b)(4)(A), stated: "Without further specificity the danger exists that the litigants will either prepare their case too early, making it possible for their opponent to exploit the preparation, or, more probably, delay naming their expert witnesses, rendering it difficult for their opponents to use the available discovery procedures." 53 MINN. L. REV., *supra* note 8, at 802-03. See also Long, *supra* note 2, at 127.

41. FED. R. CIV. P. 26(e)(1)(B); 4 J. MOORE, FEDERAL PRACTICE ¶ 26.66 [3] (1975). The duty to supplement responses is a continuing duty and does not end with the beginning of trial. *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449 (2d Cir. 1975).

42. 515 F.2d 449 (2d Cir. 1975).

Chrysler to put on expert evidence concerning this theory and by not allowing the plaintiff to put on evidence in rebuttal, the trial court erred and the judgment entered on a jury verdict for the defendant was reversed.⁴³

Similarly, a plaintiff who had not informed the defendant of an expert hired after the answering of interrogatories was precluded from calling the expert as a witness in *Tabatchnik v. G. D. Searle & Co.*⁴⁴ In discussing the duty to supplement seasonably responses to discovery, the court stated:

In the absence of unexpected developments, supplementation after the jury has been drawn cannot be considered to have been made "seasonably." The subjective explanation for the default is irrelevant. It makes no difference whether it was due to a failure to prepare for trial or to an intentional purpose to gain the benefit of surprise. The rule bars the result without regard to cause, except for those beyond control.⁴⁵

The requirement that a party answer interrogatories by identifying each expert expected to be called as a witness at trial and by stating the substance of the facts and opinions upon which each will testify is contained in section (i) of 26(b)(4)(A).⁴⁶ Compliance with this form of discovery is mandatory upon the parties. Whether further discovery, such as production of documents or taking of depositions, will be permitted under section (ii) of 26(b)(4)(A), is a matter within the court's discretion. Before moving for further discovery under section (ii), the inquiring party should first exhaust discovery through interrogatories available under section (i).⁴⁷

43. The court stated it made no difference that the plaintiff may have been aware such testimony would be presented because of similar arguments in state court litigation. The issue as to the propriety of the failure to provide the information is not merely whether the plaintiff has been surprised by the testimony. *Id.* at 456. An interrogatory response is insufficient even though the information sought is "within the knowledge of the interrogating party." *Id.*, quoting *Bowles v. Safeway Stores, Inc.*, 4 F.R.D. 469, 470-71 (W.D. Mo. 1945). Emphasizing the issue formulation purposes of discovery, the court declared:

Consequently, to characterize the issue here as being determined by a lack of "surprise" distorts the essential problem. The policy which prompted amendment to Rule 26(b)(4) of the Federal Rules of Civil Procedure to allow more liberal discovery of potential expert testimony was not merely for convenience of the court and the parties, but was intended to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact. *Id.* at 456-57.

44. 67 F.R.D. 49 (D.N.J. 1975).

45. *Id.* at 55.

46. For examples of what courts consider to be adequate responses to 26(b)(4)(i) interrogatories, see *Olmert v. Nelson*, 60 F.R.D. 369 (D.D.C. 1973); *Rupp v. Vock & Wiederhold, Inc.*, 52 F.R.D. 111 (N.D. Ohio 1971).

47. *United States v. John R.-Piquette Corp.*, 52 F.R.D. 370 (E.D. Mich. 1971); *Wilson v. Resnick*, 51 F.R.D. 510 (E.D. Pa. 1970).

No guidelines are set forth as to when further discovery should be allowed by the court. If such discovery is granted, the court must require the inquiring party to pay the expert a reasonable fee for time spent in responding and may require the inquiring party to pay the other party a fair portion of the fees and expenses reasonably incurred in procuring the expert's information.⁴⁸ The payment provisions of 26(b)(4) are intended to alleviate the unfair result of a party using expert information which was procured and developed at the expense of the opposing party.⁴⁹

According to the Advisory Committee, "a party cannot obtain discovery simply by offering to pay fees and expenses."⁵⁰ The "unfairness" element inherent in allowing discovery of an opponent's expert is not totally negated⁵¹ by the payment provisions of 26(b)(4)(C), and even when such payment is proffered, a court may decide further discovery under (A)(ii) should not be allowed. Discovery should provide full disclosure of an expert's opinion and the facts and reasons upon which it was based, but should not permit the inquiring party to develop impeachment material or to obtain the expert's opinion based upon a different set of facts.⁵²

Divergent results have been reached regarding what circumstances mandate the granting of further discovery. Despite the Advisory Committee's statement to the contrary,⁵³ one court has held that a party should be allowed to depose experts freely as long as there is an appropriate payment of costs and fees.⁵⁴ Other courts have refused requests for further discovery.⁵⁵

Before granting further discovery under (A)(ii), there should be some showing of need which has not been satisfied by the interrogatory responses under (A)(i). The court should weigh this need against the possibility of a

48. FED. R. CIV. P. 26(b)(4)(C).

49. Advisory Committee's Note, *supra* note 19, at 505.

50. *Id.*

51. See note 12 and accompanying text *supra*.

52. Knighton v. Villian & Fassio, 39 F.R.D. 11 (D. Md. 1965).

53. See note 50 and accompanying text *supra*.

54. Herbst v. ITT, 65 F.R.D. 528 (D. Conn. 1975). The *Herbst* court adopted the liberal discovery concept of *United States v. John R.-Piquette Corp.*, 52 F.R.D. 370 (E.D. Mich. 1971), which stated: "[T]he mutual and simultaneous exchange of the factual information and opinions of the parties' respective experts . . . will best facilitate a clarification of the issues and prepare all counsel for orderly and expeditious presentation at trial." *Id.* at 373.

55. Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972); Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970). In both cases, the parties were seeking production of documents prepared by the experts and were not seeking merely to take depositions. The result was possibly influenced by the application of rule 26(b)(3). See notes 70-85 *infra* and accompanying text.

party preparing his case with information obtained from the expert retained by his opponent.⁵⁶ However, further discovery under (A)(ii) should not be precluded if potential abuses can be prevented by the issuance of a protective order limiting the scope or establishing the conditions of such discovery.⁵⁷ In ruling on a motion for further discovery, it is preferable to resolve any judicial doubts in favor of allowing some form of additional discovery to permit the parties to procure a mutual knowledge of all the relevant facts prior to trial.⁵⁸

RULE 26(b)(4)(B): THE EXPERT NOT EXPECTED TO BE CALLED AS A WITNESS

Once a party has decided not to call as a witness an expert retained in anticipation of litigation, the need for discovery to prepare an effective cross-examination vanishes. In contrast, the policy reasons for restricting discovery grow stronger in such a situation. The fear that an opponent will have access to any adverse information developed by an expert who will not be used at trial should be alleviated. Accordingly, rule 26(b)(4)(B) severely curtails discovery of non-witness experts by providing that the facts or opinions held by them may be obtained by an opponent only in

56. The ruling of a court may depend upon what type of discovery is requested. A court may allow a party to depose an expert but refuse to compel production of a report prepared by that expert. See notes 54 and 55 and accompanying text *supra*. See also 8 WRIGHT & MILLER, *supra* note 3, § 2025, at 215-16 (production of documents prepared in anticipation of litigation is denied when the inquiring party can obtain the same information by taking a deposition).

57. See FED. R. CIV. P. 26(c).

58. Professor Friedenthal states:

The obvious objection to permitting unlimited discovery for cross-examination is that it is impossible to divorce information for purposes of impeachment from information to be used in direct support of the discoverer's own case. A court may control the actual introduction of evidence at trial, but it cannot prevent the use of information, ostensibly obtained for cross-examination only, to provide new approaches or to collect data which can be utilized by the discoverer's experts but which information was obtained only after considerable calculation and expense to the adverse party. A decision must be made, then, whether the needs of cross-examination outweigh the unfairness which could result. As already pointed out, the benefits to cross-examination in cases involving expert witnesses are substantial, whereas the unfairness, if it does exist in a particular case in terms of time, effort, and money, is often no worse in the case where an attorney seeks information from an adverse party's expert than it is where he seeks it from an eye-witness found by the adverse party after long and costly search. The ultimate requirement that judicial decisions be based on the true facts overcomes any detriment which might be suffered by the adversary system. Friedenthal, *supra* note 8, at 487.

Advisory Committee's Note, *supra* note 19, at 504 cites the section of the Friedenthal article containing this passage as a "full analysis of the problem and strong recommendations to the same effect [as those adopted in 26(b)(4)(A)]."

certain exceptional situations. The terms of 26(b)(4)(B) are unclear as to whether even the identity of such an expert is freely discoverable. Two courts which have considered the matter have reached opposite results.⁵⁹

Before a party can obtain facts known and opinions held by the non-witness expert, he must show that there are "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."⁶⁰ Such exceptional circumstances arise when the only known expert available on a particular subject has been retained by the opposing party,⁶¹ or when the other party's expert has made an examination or inspection which, due to a change of conditions, can no longer be made by another expert.⁶²

Discoverability under 26(b)(4)(B) appears to turn on whether one party possesses information which the opposing party cannot obtain through the exercise of ordinary diligence. When a court does allow discovery after finding the presence of exceptional circumstances, it is mandatory that the court require the inquiring party to pay both a reasonable fee to the expert for time spent responding to discovery and a fair portion of the fees and expenses the other party incurred in obtaining the expert's facts and opinions.⁶³

59. In support of allowing discovery of the identity of such experts, see *Sea Colony, Inc. v. Continental Ins. Co.*, 63 F.R.D. 113 (D. Del. 1974); 8 WRIGHT & MILLER, *supra* note 3, § 2032. *Contra*, *Perry v. W. S. Darley & Co.*, 54 F.R.D. 278 (E.D. Wis. 1971).

Discovery of the identity of the non-witness expert should be allowed to alert a party to the possible existence of information to which he may be entitled after making the necessary showing of exceptional circumstances. "This type of information is usually the first step in discovering the existence of reports of experts consulted. Should counsel thereafter attempt to ascertain the contents of such reports, a full-dress showing of exceptional circumstances would be a condition precedent to discovery." *Sea Colony, Inc. v. Continental Ins. Co.*, *supra*, at 114.

60. FED. R. CIV. P. 26(b)(4)(B).

61. *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972). The inability to obtain the specific opinion of an expert engaged by an opposing party is not a sufficient showing of exceptional circumstances when opinions on other experts on the same subject may be procured. See *Crockett v. Virginia Folding Box Co.*, 61 F.R.D. 312 (E.D. Va. 1974). Under the facts of this case, a strong argument could be raised that the expert was actually an actor or viewer with regard to occurrences alleged relevant to the litigation and not an expert retained in anticipation of litigation protected from discovery under 26(b)(4)(B). The plaintiff conceded that the expert was retained in anticipation of litigation. *Id.* at 320. For a discussion of this case, see notes 78-83 and accompanying text *infra*.

62. See, e.g., *Sanford Const. Co. v. Kaiser Alum. & Chem. Sales, Inc.*, 45 F.R.D. 465 (E.D. Ky. 1968); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954); *Colden v. R. J. Schofield Motors*, 14 F.R.D. 521 (N.D. Ohio 1952).

63. FED. R. CIV. P. 26(b)(4)(C).

THE EXPERT WHO PLAYS TWO ROLES

While the involvement of an expert in a particular case can fall into any of four distinct categories,⁶⁴ the quantum of permissible discovery varying with each, frequently the same expert falls into more than one category. An expert might be retained by a party to analyze and render information on more than one aspect of the case and, as the trial approaches, the party may decide to have the expert testify on only one of the subjects upon which he has formed an opinion. Under such circumstances, with the expert in effect wearing two hats, is discovery controlled by 26(b)(4)(A) or (4)(B)? Similarly, an expert may be an observer of certain events relevant to the litigation, thus not protected by 26(b)(4), and may also be an expert retained in anticipation of litigation.

Prior to 1970, when confronted with an expert who held both information subject to discovery and also information not subject to discovery, the courts did not hesitate to enter orders allowing discovery but with the scope limited.⁶⁵ Although rule 26(b)(4) does not expressly address the issue, the courts have continued to dissect the information of an expert, thus limiting discovery in a manner consistent with the policy of 26(b)(4).⁶⁶

In *Inspiration Consolidated Copper Co. v. Lumbermens Mutual Casualty Co.*,⁶⁷ the accounting firm of Price Waterhouse had been both the general auditor for the plaintiff corporation and had prepared two reports concerning a claim against the defendant insurance company. The plaintiff intended to call Price Waterhouse as a witness only in regard to one of

64. See notes 23-36 and accompanying text *supra*.

65. See *Lee v. Crown Cent. Pet. Corp.*, 33 F.R.D. 11 (S.D. Tex. 1963); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954); *Floe v. Plowden*, 10 F.R.D. 504 (E.D.S.C. 1950); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947).

66. *Inspiration Consol. Copper Co. v. Lumbermens Mut. Cas. Co.*, 60 F.R.D. 205 (S.D.N.Y. 1973); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972); *In re Brown Co.*, 54 F.R.D. 384 (E.D. La. 1972).

Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975), apparently rejected such an approach. The court held that a general employee expert who acquired information only when specially assigned to the case in anticipation of litigation was not entitled to protection from discovery under 26(b)(4). This decision is contrary to the rule's emphasis on whether the information sought was acquired as a result of pending litigation and not on the status of the expert prior to acquiring the information.

Seiffer v. Topsy's Int'l, Inc., 69 F.R.D. 69 (D. Kan. 1975), presents a more logical analysis of the same problem. A general employee of the defendant accounting firm was requested by counsel to review certain working papers and audit reports. This was the employee's first involvement with the subject matter of the suit. The court held that the employee was an expert "specially employed" in anticipation of litigation; therefore rule 26(b)(4) controlled the discovery of his reports.

67. 60 F.R.D. 205 (S.D.N.Y. 1973).

the reports prepared by it. As general auditor, Price Waterhouse was not an expert retained in anticipation of litigation and therefore was discoverable as an ordinary witness.⁶⁸ However, the court viewed Price Waterhouse as an expert protected by 26(b)(4) with regard to the reports prepared in anticipation of litigation and would not allow production of reports on which Price Waterhouse would not be called as a witness at trial.⁶⁹

As *Inspiration Consolidated Copper Co.* demonstrates, the allowable discovery of an expert is dependent upon the nature of his contact with the litigation and its subject matter. It is possible for the same individual to have a multiplicity of distinct and divergent contacts requiring the parties to specify what information is being sought from the expert and what the involvement of the expert with the litigation or its subject matter was at the time he acquired such information. Only then is a court able to ascertain the scope of discovery allowable.

THE WORK PRODUCT RULE OF 26(b)(3) AND THE EXPERT

The applicability of the work product doctrine of *Hickman v. Taylor*⁷⁰ to the expert was a source of controversy for many years, but by the 1960's the courts began rejecting the work product rule as imposing a limitation on the discovery of expert information.⁷¹ In 26(b)(4), the draftsmen seemingly laid to rest the matter by disavowing the work product doctrine as a rationale for protecting expert information from discovery.⁷²

The 1970 amendments⁷³ codified the work product doctrine by adopting rule 26(b)(3).⁷⁴ This rule resolved the conflict as to whether the work product doctrine covered only the preparatory work of attorneys. A special

68. *Id.* at 210.

69. *Id.*

70. 329 U.S. 495, 511 (1947).

71. See notes 10 and 11 and accompanying text *supra*.

72. Advisory Committee's Note, *supra* note 19, at 505.

73. 398 U.S. 977 (1970).

74. FED. R. CIV. P. 26(b)(3) provides in part:

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

showing of need is now required before allowing the production of materials prepared in anticipation of litigation by or for a party (or any representative acting on his behalf) as well as those materials prepared by an attorney.⁷⁵

Limiting access to expert information under the *Hickman* doctrine was an outgrowth of the broader dispute of whether the work product rule was applicable to materials prepared by non-lawyer agents or representatives of parties.⁷⁶ The 1970 amendments appeared to accept the case law providing work product protection to the non-lawyer agent or representative, but did not extend the rule's scope to embrace the expert. Rule 26(b)(3) supports such a contention by stating that it is "[s]ubject to the provisions of 26(b)(4)."⁷⁷ In applying the amended rules to the discovery of an expert's report, it would be possible to construe 26(b)(4) as controlling and making 26(b)(3) irrelevant.

Courts have thus far not interpreted the amended rules in the above manner. Instead, they have subjected requests for production of documents prepared by experts to the provisions of both 26(b)(3) and 26(b)(4).⁷⁸ Under this view, an inquiring party would not only have to satisfy the requisite requirements of 26(b)(4)(A) or (4)(B) before discovering an expert's report, but would also have to show a pressing need for the materials and an inability to obtain the substantial equivalent by other means.⁷⁹

The conflict between the rejection of the work product rationale as a basis for limiting discovery of the expert and the application of rule 26(b)(3) to the report of an expert is not irreconcilable. As noted earlier, the information held by an expert is viewed as essentially evidentiary in nature and not akin to the legal theory and strategy of the attorney's work product. However, if the expert does undertake a consulting role in preparing for litigation, a court may quite logically view the expert as being in the class of non-lawyer agents protected from discovery by 26(b)(3). In any

75. Advisory Committee's Note, *supra* note 19, at 501-02. See also 8 U. RICH. L. REV. 340 (1974).

76. *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1950), held that the work product doctrine applied to non-lawyer investigators. *Allmont* was the basis for decisions holding that experts retained in anticipation of litigation were protected from discovery by the work product doctrine. See, e.g., *Vaughn v. Chrysler Corp.*, 46 F.R.D. 6 (W.D. Okla. 1969); *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959).

77. FED. R. CIV. P. 26(b)(3).

78. *Crockett v. Virginia Folding Box Co.*, 61 F.R.D. 312 (E.D. Va. 1974); *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202 (N.D. Miss. 1972); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972); *Wilson v. Resnick*, 51 F.R.D. 510 (E.D. Pa. 1970).

79. FED. R. CIV. P. 26(b)(3).

event, it should be pointed out that 26(b)(3) only limits discovery of the expert's report and has no effect if the party is merely attempting to depose the expert.

Although the discovery requirements of 26(b)(3) and 26(b)(4) overlap, the application of both rules to the discovery of an expert's report can increase the required showing of the requesting party. In *Crockett v. Virginia Folding Box Co.*,⁸⁰ the plaintiff was denied access to documents prepared by an expert of the defendant in anticipation of litigation. The court acknowledged that the plaintiff had met the requirement of 26(b)(4)(B) by establishing that such information could not be obtained through the use of independent experts.⁸¹ The court then considered the substantial need showing required for discovery under 26(b)(3).⁸² Balancing the materiality of any evidence contained in the reports of the expert against the danger of disclosing information prepared in anticipation of litigation, the court concluded that the plaintiff had failed to establish a substantial need for the materials.⁸³

Both 26(b)(3) and 26(b)(4)(B) require a party seeking discovery to demonstrate an inability to procure the same information by other means. As *Crockett* illustrates, rule 26(b)(3) also mandates that the court consider the importance of the materials to the party seeking them.⁸⁴ By subjecting materials prepared by an expert in anticipation of litigation to 26(b)(3), a different and more stringent discovery limitation is imposed than when a party is merely seeking to depose the expert.⁸⁵

80. 61 F.R.D. 312 (E.D. Va. 1974).

81. *Id.* at 320.

82. Rule 26(b)(4) is not explicit in setting forth the requirement that a 'substantial need' be shown. However, it is clear that Rule 24(b)(4) [*sic*] was drafted as a further limitation on materials and information otherwise discoverable under Rule 24(b)(3) [*sic*]. See introductory paragraph to Rule 24(b)(4) [*sic*]. Rule 24(b)(3) [*sic*] specifically provides for a demonstration of 'substantial need.' That requirement would therefore apply to Rule 24(b)(4) [*sic*] by reference and implication. *Id.* at 320 n.17.

83. *Id.* at 320. The expert hired by the defendant was a psychologist whose task was to review the employment testing program of the defendant with regard to the possibility that the program was violative of Title VII of the Civil Rights Act of 1964. The plaintiffs brought a class action suit alleging certain discriminatory employment practices by the defendant. They anticipated the defendant raising a "good faith" defense to certain allegations in the suit and contended information prepared by the expert was the only available evidence on the subjective state of mind of the defendant company officials. In rejecting the discovery request, the court decided evidence of the subjective state of mind of company officials would not be of substantial use in resolving the issue of good faith. *Id.* at 321.

84. Advisory Committee's Note, *supra* note 19, at 501.

85. *Compare* Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972) with *Herbst v. ITT*, 65 F.R.D. 528 (D. Conn. 1975).

CONCLUSION

In recent years, the bar has evinced an increasing acceptance of applying liberal discovery practices to expert information developed in anticipation of litigation. Often, counsel will bypass the rigors of rule 26(b)(4) and exchange the reports of their experts or allow the opposing party to freely depose the expert. Yet not infrequently, a party will resist discovery of his expert, believing that such discovery would be prejudicial to his cause.

Prior to 1970, a court had to analyze and choose between diverse policy considerations in ruling on the discoverability of expert information. The 1970 amendment to the Federal Rules of Civil Procedure removed this burden by providing a uniform method of approaching the discovery of expert information. A court, provided with the guidance and policy of rule 26(b)(4), need only make a factual determination as to what, if any, provisions apply to the expert information sought. Although minor questions remain, parties are now able to prepare for trial with a reasonable certainty as to the discoverability of an expert's information developed in anticipation of litigation.

T. W. W.